PB Securities Sdn Bhd v Abdul Rashid bin Mohamed

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-1177-1993
RICHARD TALALLA J
13 JUNE 1994

Civil Procedure *— Summary judgment — Affidavit — Affidavit in reply — Time for filing — Whether under O 14 r 2(3) or O 32 r 13(2) — Rules of the High Court 1980 O 14 r 2(3), O 32 r 13(2)*

In these proceedings for summary judgment, the issue before the court was whether O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC') applied to O 14 proceedings. The plaintiff sought to have the court disregard the defendant's affidavit in reply on the ground that it had been served out of time, ie it had not been served within 14 days of service of the plaintiff's affidavit in accordance with O 32 r 13(2)(b), relying on *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704.

The defendant submitted that: (i) the affidavit in reply had only to be served not less than four clear days before the return day stated in the summons in accordance with O 14 r 2(3); and (ii) the decision in *Malayan Banking* was per incuriam as O 32 r 13(2) was expressly stated to apply only 'save as otherwise provided' in the RHC.

Held, upholding the defendant's submissions:

(1) Order 32 r 13(2) of the RHC does not apply to proceedings brought under O 14 or to affidavits filed or intended to be filed thereunder. Under O 14 r 2(3), the O 14 summons, a copy of the affidavit in support and exhibits referred to therein must be served on the defendant not less than four clear days before the return day. Accordingly, it seems that the subsequent general provisions of O 32 r 13(2) are not intended to interfere with the prior special provisions of O 14 r 2(3) because of the express saving provision in O 32 r 13(2).

(2) It is implicit from the provisions of O 14 r 2(3) and by long-established practice that a defendant must in this country file his affidavit by the return day. Accordingly the defendant's affidavit stood filed as of right and if the plaintiff wished to file an affidavit in reply thereto, the plaintiff should obtain leave to do so.

[Bahasa Malaysia summary

Di dalam prosiding untuk mendapatkan penghakiman terus ini, isu di hadapan mahkamah adalah sama ada A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu') terpakai kepada prosiding A 14. Plaintif telah meminta mahkamah supaya tidak mengendahkan afidavit jawapan defendan atas alasan bahawa ia telah disampaikan di luar had masa, iaitu ia tidak disampaikan dalam

masa 14 hari dari penyampaian afidavit plaintif mengikut A 32 k 13(2)(b), bergantung kepada *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704.

Defendan berhujah bahawa: (i) affidavit jawapan itu hanya perlu disampaikan tidak kurang daripada empat hari genap sebelum hari kembalian yang dinyatakan di dalam saman itu mengikut A 14 k 2(3); dan (ii) keputusan di dalam *Malayan Banking* adalah per incuriam kerana A 32 k 13(2) nyata terpakai hanya 'kecuali sebagaimana yang diperuntukkan selainnya' di dalam KMT itu.

Diputuskan, membenarkan hujah defendan:

(1) Aturan 32 k 13(2) KMT itu tidak terpakai kepada prosiding yang dibawa di bawah A 14 atau kepada afidavit yang difailkan atau hendak difailkan di bawah aturan itu. Di bawah A 14 k 2(3), saman A 14, suatu salinan afidavit sokongan dan eksibit yang dirujukkan di dalam afidavit itu mesti disampaikan ke atas defendan tidak kurang daripada empat hari genap sebelum hari kembalian. Dengan demikian, nampaknya bahawa peruntukan am A 32 k 13(2) yang terkemudian tidak bertujuan untuk mengganggu peruntukan khas A 14 k 2(3) yang terlebih awal kerana peruntukan kekecualian yang nyata di dalam A 32 k 13(2).

(2) Adalah tersirat di dalam peruntukan A 14 k 2(3) dan melalui amalan yang sudah lama mantap bahawa seorang defendan di dalam negara ini mesti memfailkan afidavitnya sebelum hari kembalian. Dengan demikian afidavit defendan tetap difailkan menurut haknya dan jika plaintif ingin memfailkan suatu jawapan, plaintif seharusnya mendapatkan kebenaran untuk berbuat demikian.]

Cases referred to

Barker v Edger [1898] AC 748 (refd)
Bostock v Ramsey Urban District Council [1900] 1 QB 357; [1900] 2 QB 616 (refd)
Davis v Spence (1876) 1 CPD 719; 25 WR 229; 2 Char Pr Cas 235 (refd)
Girvin v Grepe (1879) 13 Ch D 174; 49 LJ Ch 63; 41 LT 522; 28 WR 123 (refd)
Hasker v Wood (1885) 54 LJQB 419 (refd)
Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors [1994] 1 MLJ 704 (not folld)
Proprietors of Strata Plan No 159 v Parramatta City Council (1985) 55 LGRA 363 (refd)
Reeve v Gibson [1891] 1 QB 652 (refd)
Rotherham v Priest (1879) 49 LJQB 104; 41 LT 558; 28 WR 277 (refd)
Symon & Co v Palmer's Stores (1903) Ltd [1912] 1 KB 259 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 2(2), O 14 rr 1, 2(3), 3(1), 4(1), O 18 r 1, O 32 rr 3, 13(2), O 62 r 8
Rules of the Supreme Court 1965 [Eng]

Soh Choh Piau (*Paul Cheah & Associates*) for the plaintiff.
Ernest JK Azad (*Rahman Too & Co*) and *K Balaguru* (*K Balaguru*) (*amicus curiae*) for the defendant.

Richard Talalla J: On 1 April 1994, the plaintiff applied by summons-in-chambers under O 14 of the Rules of the High Court 1980 ('the Rules') for summary judgment. The said summons was issued on 20 April returnable before me on 19 May and served on the defendant's solicitors on 22 April at 4.25pm together with an affidavit in support. An affidavit in reply was filed and served on 11 May. Order 32 r 13(2) of the Rules reads as follows:

> Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
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> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

The affidavit in support having been served after 4pm, for the purpose of computing the period of time after service thereof, that affidavit has to be deemed to have been served on the following day. See O 62 r 8 of the Rules. Such being the case the last day for service of the affidavit in reply in accordance with r 13(2)(b) was 7 May. See O 3 r 2(2) of the Rules. The affidavit having been served on 11 May, the plaintiff argued that it is out of time and therefore should not be considered. In this regard reliance was placed on the case of *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704 which also concerned an application under O 14 and to which the provisions of r 13(2)(b) were applied and where the court disregarded two affidavits which were purportedly served out of time and in breach of the said provisions.

Counsel for the defendant submitted that the application having been brought under O 14 it is to that Order that the court should look for the procedure governing this application, that r 2(3) of that Order governed the situation and such being the case r 13(2) did not apply to the application; also that the decision in the *Malayan Banking* case above-stated was given per incuriam as it was not pointed out to the learned judge that r 13(2) is applicable only save as otherwise provided in the Rules, as expressly stated in r 13(2). It was further argued on behalf of the defendant that the attention of the learned judge was not directed to the specific provisions of r 2(3) of O 14 which by reason of the time stated therein rendered r 13(2) inapplicable.

A perusal of the judgment in that case indicates that the learned judge throughout devoted himself to the one question placed before him

and that is whether the amendment to r 13 had retrospective effect and in the end his Lordship ruled that the amendment applied retrospectively. Accordingly I do not see that decision as authority supporting a proposition that r 13(2) applies to O 14 proceedings.

As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No 159 v Parramatta City Council* (1985) 55 LGRA 363 at p 364, per Kirby P (NSW CA) it was stated that so far as is consistent with the language used, courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v Edger* [1898] AC 748 at p 754, per Lord Hobhouse (PC) it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v Wood* (1885) 54 LJQB 419 and *Bostock v Ramsey Urban District Council* [1900] 1 QB 357; [1900] 2 QB 616; and the county courts, see *Reeve v Gibson* [1891] 1 QB 652.

Applying the principles of construction above-stated I do not discern anything incompatible between O 14 and r 13(2). There is nothing to reconcile between them. They can and do operate harmoniously with each other. I find there is no need to rely on the presumption, as above-stated, O 32 as captioned therein relates to applications and proceedings in chambers. In the absence of anything else this Order is to apply generally. Rule 13(2)(b) is, as expressly stated therein, to apply save as otherwise provided in the Rules. Hence the maxim '*generalia specialibus non derogant*' fits into the construction of this provision like a hand in a glove. In truth the maxim is superfluous. The provision speaks for itself. Order 14 is then looked at for other provisions and it is discovered that under r 2(3) thereof the O 14 summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than four clear days before the return day. Accordingly it seems that the subsequent general provisions of r 13(2) are not intended to interfere with the prior special provisions of O 14 r 2(3); a fortiori because of the express saving in r 13(2) as set out above.

By reference to r 4(1) of O 14 a defendant may show cause against an application under that Order by affidavit or otherwise to the satisfaction of the court. Experience has shown that almost always a defendant seeks to show cause by affidavit. Indeed in England the masters usually require an affidavit before they can be 'satisfied'. See 1 *The Supreme Court Practice 1993*, marginal para 14/3-4/3. Counsel for the plaintiff submitted that there was no provision in r 2(3) or anywhere else for time within which this affidavit is to be filed and that being the case r 13(2) had to apply to the filing of such an affidavit and likewise to a plaintiff's affidavit in reply to a defendant's affidavit. I do not consider that to be so. It is implicit from the provisions of r 2(3) and by long-established practice that a defendant must

in this country file his affidavit by the return day; in England, as shall be explained presently, not less than three clear days before the return day. I can do no better in this regard than to refer to and respectfully adopt the passage in 29 *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2nd Ed) at pp 192 and 193:

> There is no express provision in the Rules of the Supreme Court 1965 which specifies any particular time for service of the defendant's affidavit, but clearly such an affidavit should be served in good time on the plaintiff, to enable him to have a reasonable opportunity to deal with it before the return day. The form of summons contains an express notice to the defendant requiring him to send a copy of his affidavit in answer to the plaintiff or his solicitor to reach him not less than three days before the return day, and the master will exercise his discretion as to the costs of any adjournment occasioned by the late production of the defendant's affidavit.

In England summonses under O 14 are returnable not less than ten clear days after service. See Practice Direction (Order 14: Return Date) [1970] 1 WLR 258. Also in that country the form of O 14 summons contains an express notice to the defendant requiring the defendant to send a copy of his affidavit in answer to the plaintiff or his solicitor to reach the same not less than three days before the return day. There is no such notice in our corresponding form of summons.

Apart from the express provisions of O 14, over a period of more than 100 years, a vast body of case law has established the practice and procedure governing proceedings under O 14. As far back as the year 1911 in *Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259, Buckley LJ at p 266 warned that whereas as a rule there must be a trial first and then judgment, under the Order XIV procedure there is judgment at once and never any trial and that accordingly such a procedure must be strictly confined to the specific cases provided in the Order. In the same case Vaughan Williams LJ at p 264 said:

> Order XIV makes, no doubt, a very salutary provision for the purpose of preventing a defendant, who knows perfectly well that he owes the sum claimed, from postponing the time of payment, and putting the plaintiff to further expense in a litigation which ought never to have taken place; but on the other hand Order XIV is an Order which can be, and often is, abused. A plaintiff's legal adviser may advise him that, though there is not much prospect of his getting judgment under Order XIV, and the defendant may ... have to swear an affidavit in answer to an application for judgment, in which he will have to disclose on oath what defence he is going to set up, and that may be a great assistance to the plaintiff at the trial, and therefore such an application should be made. I hope that this does not often occur, but I think that such a course is sometimes taken, and in my opinion that is a manifest abuse of the process of the court.

Thus from the earliest times the court had set the blueprint for the procedure to be adopted in applying the provisions of O 14.

A competent solicitor acting for a prospective plaintiff in an appropriate case will have in mind this blueprint and from the earliest time, that is to say when first taking instructions and proofing potential witnesses there

A will be born in such solicitor's mind a question namely whether or not to advise proceeding under the Order for summary judgment. If it is decided so to proceed the plaintiff is best advised, notwithstanding the provisions of O 18 r 1, to file the writ of summons accompanied by a statement of claim and the O 14 summons forthwith upon appearance being entered and serve the same immediately upon it being issued, despite the provisions B of r 2(3). The plaintiff having thus acted with alacrity would have set by example a tight timetable to which the defendant would be expected to reciprocate. Bearing in mind that O 14 is limited to cases to which the plaintiff verily believes there is no defence and has or has caused to be deposed in the affidavit in support to that effect and the defendant knows C perfectly well the plaintiff's claim has to be met, the defendant is best advised not to oppose the summons and submit to judgment bearing in mind the consequences of making a false affidavit and the laws of contempt of court in making a false statement of fact to the Judge upon which the defendant intends the Judge to rely in making a decision. On the other hand if a defendant is properly advised or has good reason to believe that D there is a bona fide question or issue in dispute which ought to be tried or there ought for some other reason to be a trial, see O 14 r 3(1), there should be no difficulty in deposing thereto briefly and succinctly before the return day. Again by reference to *Atkin's Encyclopaedia* above-stated at p 192:

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> Generally speaking the facts upon which the defence relies are usually capable of concise expression, and a lengthy affidavit is unnecessary; indeed, a long, rambling affidavit full of irrelevant detail may bear the appearance of being a sham and if the defendant's affidavit is insufficient or inadequate in any respect, he may apply for and obtain (subject to any question of costs) an adjournment to file further evidence to supplement or supply any F deficiencies.

As to a plaintiff wishing to file an affidavit in reply to a defendant's affidavit, unlike the case of a defendant, there is nothing in the Rules giving a plaintiff a right to do so and accordingly it is not surprising that there is no time provision for such an affidavit. A plaintiff will need to G obtain the leave of the court to do so. See *Davis v Spence* (1876) 1 CPD 719; 25 WR 229; 2 Char Pr Cas 235; *Girvin v Grepe* (1879) 13 ChD 174; 49 LJ Ch 63; 41 LT 522; 28 WR 123 and *Rotherham v Priest* (1879) 49 LJQB 104; 41 LT 558; 28 WR 277. Inasmuch as leave of court is required, the judicial mind will have to be applied to the circumstances pertaining H and in this regard once again I refer to *Atkin's* book above-stated, this time at p 193 where it reads:

> There is no object or value in an affidavit in reply by the plaintiff which merely contradicts on oath the sworn statements of the defendant, for the case cannot be tried on the affidavits (*Saw v Hakim* (1889) 5 TLR 72, per Pollock B). Where the defendant is able to set up a triable issue, an affidavit I in reply will usually merely have the effect of emphasizing that there is an issue to be tried. On the other hand, if the plaintiff by his affidavit in reply can clearly establish that there is no real defence by setting up undisputed facts (*Shurmur v Young* (1888) 5 TLR 155, CA; see also *Bank fur Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541, [1971]

1 WLR 149, CA) or by exhibiting some undoubted document (*Saw v Hakim*, supra), he may obtain summary judgment (*Girvin v Grepe* (1879) 13 Ch D 174, CA; *Bank fur Gemeinwirtschaft v City of London Garages Ltd*, supra) or the defendant may be granted leave to defend on terms, for example, of bringing the whole or a substantial part of the sum claimed into court (*Lloyd's Banking Co v Ogle* (1876) 1 Ex D 262, per Bramwell B).

If the plaintiff so requests, he will generally be given leave to file an affidavit in reply, subject to the question of costs, for until he files his further evidence its value remains unknown. In such a case, the hearing of the summons for judgment will usually be adjourned to enable the plaintiff to consider and if necessary to file further evidence. At the same time, if the defendant so requests, he too will be given leave to file further evidence if so advised. It is generally better for both parties to have the fullest opportunity of placing all the evidence they desire before the court. In any case, if the master refuses leave to file further evidence, the judge on appeal may give such leave.

It follows that if the court is minded to grant such leave it will also stipulate the time within which the affidavit is to be filed and likewise in the rare instance of subsequent affidavits being permitted by the court to be filed.

As I understand it r 13 originally stood as it now does in sub-r 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the 11th hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rule Committee in introducing r 13(2) intended that its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O 14.

Order 32 r 3 of the Rules is in pari materia with the same numbered English rule which, disregarding the exception therein, reads as follows:

> ... unless the Court otherwise orders or any of these rules otherwise provides a summons must be served on every other party not less than two clear days before the day so specified.

In 1 *The Supreme Court Practice 1993* at para 32/1-6/8 it is stated in reference to the words 'unless the Court otherwise orders' that a summons under O 14 r 1 is an exception to r 3 last referred to. It follows by analogy that r 13(2) does not apply to an O 14 application.

For the reasons above-stated I find that the provisions of O 32 r 13(2) of the Rules of the High Court 1980 do not apply to proceedings brought under O 14 of the said Rules or to affidavits filed or intended to be filed thereunder. Accordingly the defendant's affidavit herein stands filed as of right and if the plaintiff wishes to file an affidavit in reply thereto the plaintiff will need to obtain the leave of the court so to do.

Order accordingly.

Reported by Anne Khoo